Filed 1/28/19 P. v. Estrada CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. AMADOR ESTRADA, Defendant and Appellant.	G055095 (Super. Ct. No. 16NF0447) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed in part, vacated in part, remanded for further proceedings.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene Sevidal, Andrew Mestman and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Amador Estrada of three counts of committing a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a) (subsequent statutory references are to the Penal Code unless specified otherwise). It also found true an allegation defendant committed these offenses against more than one victim (§§ 667.61, subds. (b) & (e), 1203.066, subd. (a)(7)). The trial court imposed an indeterminate sentence of 30-years-to-life in prison, comprising two consecutive 15 years to life sentences on counts 1 and 3, and a concurrent 15 years to life on count 2.

On appeal, defendant raises four claims: (1) The trial court prejudicially erred by excluding defense evidence purporting to show some prosecution witnesses may have been motivated to testify falsely in order to acquire favorable immigration visas; (2) the prosecutor misstated the burden of proof in her closing argument, and defense counsel's failure to object constituted ineffective assistance of counsel; (3) CALCRIM No. 1193 (child sexual abuse accommodation syndrome) erroneously lessens the prosecution's burden of proof, thereby violating defendant's due process rights; and (4) the trial court erred in requiring defendant to submit to AIDS testing, and the matter must be remanded to determine whether such an order was justified.

We reject the first three claims and affirm defendant's convictions and prison sentence. The Attorney General concedes the trial court's order for AIDS testing was not supported by a requisite probable cause finding and agrees the matter must be remanded to determine if such a finding can be made since the issue was never addressed below. We accept the Attorney General's concession.

Consequently, the judgment is affirmed in part, vacated in part, and the matter is remanded to the trial court for further proceedings to determine if an AIDS testing order is justified.

FACTS

Defendant was charged with three counts of committing a lewd act on a child under the age of 14. Two counts involved victim D.T.,[1] and one count involved victim S.F. Defendant is D.T.'s maternal uncle. S.F. is D.T.'s cousin and defendant is also S.F.'s maternal uncle. D.T.'s and S.F.'s mothers are defendant's sisters.

1. *Counts* 1 *and* 2: *Victim D.T.*

In 2015, nine-year-old D.T. lived at home with her parents, paternal grandparents, and three brothers. Almost every weekend her mother would drop her off at her maternal grandmother's (F.B.) house. D.T.'s aunt and her four children, C.F., F.F., H.F., and victim S.F., lived with the F.B. So too did defendant. When D.T. stayed over at F.B.'s house, she slept in the living room with defendant and another uncle. Her cousins slept in another room with their mother, and F.B. slept in her own room.

In February 2016, D.T. told two school friends that her uncle—defendant—had touched her on her "private parts." One friend's mother reported it to the school principal. The principal met with D.T. the following day and had her make a written statement. In it, D.T. wrote defendant had been touching her at night. She then spoke with D.T., who told her she sometimes spent the night at F.B.'s house, where she slept in the living room with her uncles. When her other uncle left for work early in the morning, defendant would touch her on her "private parts." The principal asked her if defendant had ever tried to "put anything inside" her, and D.T. replied "Yes." Police were called.

Fullerton Police Detective Carin Wright responded to the school and met with D.T. Wright videotaped her interview of D.T., and the tape was later played for the jury. The tape and a transcript of the interview were entered into evidence. Wright asked

[1] California Rules of Court, rule 8.90(b)(4), (10), states we "should consider referring to" certain individuals "by first name and last initial or, if the first name is unusual or other circumstances would defeat the anonymity, by initials only" to protect those individuals' privacy. Accordingly, we refer to all victims and witnesses by first and last initial.

D.T. if defendant had touched her in her private areas, "like your vagina or your breasts," and D.T. responded "Uh-huh." D.T. told Wright she used to sleep over at her F.B.'s house and slept in the living room with her uncles. When her other uncle went to work, defendant would put his hand on her "private thing," which she later clarified to mean her vagina. Defendant would rub her vagina for about five seconds, and D.T. would roll over to get him to stop. The touching occurred over the blanket and D.T. said he had never touched her under her clothes. This happened five to ten times. D.T. told Wright she did not like him touching her, but "I never told him 'cause I, I think he's gonna do more stuff to me." D.T. said defendant did the same thing to her three times when they were sitting on the sofa and everyone else was sleeping, and on another occasion when they were together in her aunt's room. D.T. told Wright the last time defendant touched her was in the summer of 2015. D.T. also told Wright she told C.F., F.F., and H.F. about what happened to her. She also told her mother. Her mother told her to sleep in her aunt's room.

Wright visited D.T.'s mother at her apartment, but she was neither cooperative nor uncooperative. Wright then visited F.B, who told her defendant had moved out and was now living in Santa Ana. Police later determined defendant had moved out of F.B.'s apartment in October or November of 2015.

About a week and a half after Wright's interview, D.T. was reinterviewed by a social worker from the Child Abuse Services Team (CAST). This interview was also videotaped and played for the jury, a transcript was again provided, and both were admitted into evidence. D.T. admitted to the social worker she told her friends, her principal, and the police that defendant touched her private part, but she had "accidentally said a lie" about defendant touching her. D.T. said that she thought defendant had touched her vagina but that it was only a dream. She said defendant had just pulled down her shirt one time. She explained to the social worker that after she told police about defendant touching her, her paternal grandmother (grandmother) suggested defendant had

instead just pulled down her shirt. D.T. changed her mind about defendant touching her after she talked to her grandmother. She said she could see on her grandmother's face she was upset. D.T.'s mother was also crying, and D.T. felt bad. D.T. told the social worker defendant was in jail because she had lied. She said her friends thought it was a good idea to tell the police, but it was a "bad thing" because defendant was in jail and her grandmother felt bad.

D.T. explained that on the same day she talked to the police, F.B. had called D.T.'s mother crying, and said D.T. could not come over to her house anymore. D.T.'s mother told her that no one wanted her over at her maternal grandmother's house anymore. D.T. was upset when her grandmother had said she could not come over anymore; she did not like having everyone mad at her. D.T. said she had told her mother about defendant touching her private part one day when they were at her F.B.'s house. She said her mother either did not hear or just told her to sleep with her aunt and cousins. D.T. admitted she started sleeping in her aunt's room after that because she felt safer there. She also told the social worker she did not feel safe around defendant.

At trial, D.T. reiterated her CAST interview, and either recanted her earlier statements to her friends, the principal, and police, or professed not to remember what she said or what had happened. She did testify that, after talking to police, she went home to find her mother crying and her grandmother upset with her. She stated she felt bad defendant got in trouble, and she wished she could just take everything back, and go back to the way things were.

2. *Count* 3*: Victim S.F.*

After Wright spoke to D.T., she decided she needed to talk to D.T.'s cousins. This led her to interview S.F. at the police station. Wright testified S.F. was crying and very emotional, and at first reluctant to talk. But once the male officers left the room, S.F. told Wright that when she was nine or 10 years old, and alone in the

kitchen with defendant, he had grabbed her, spun her around, and started rubbing against her. As he did so, she felt his "thingy" go up.

At trial, S.F. testified that when police first told her they wanted to talk to her about her uncle, she knew they meant defendant and not her other uncle. She told the jury that when she was between seven and nine years old,[2] she was in the kitchen with defendant when he spun her around, so she was facing him. He then held her in place with his hands and rubbed his body against hers for a couple of seconds. She could feel his penis get erect. Another time when they were both in the hallway, S.F. said defendant again pressed himself up against her, and rubbed his body against hers. She also recalled other occasions when he would stare at her "private area" and lick his lips. Thereafter, S.F. tried to avoid defendant. On more than one occasion, S.F. tried to tell her mother what defendant had done to her, but her mother "wouldn't pay attention" and "just walked away." She was afraid to tell police what had happened to her because she was afraid they would "separate me, from like my mom or something."

3. *Statements and Testimony of the Other Family Members*

A.) F.F.

F.F. testified that when police started interviewing her, they told her they wanted to talk to her about her uncles. She responded by asking if it had to do with defendant. F.F. was 17 years old when she testified, but when she was in elementary school, defendant told her he wanted to teach her how to make love. He told her it would feel good. He also told her that he wanted to have sex with her and it would feel good. Defendant then stuck out his tongue and moved it in a "sexual way." On other occasions when she was around defendant, he would again move his tongue in a way that made her feel uncomfortable. She also saw pictures of herself on defendant's phone. F.B. and F.F.'s sisters all told her not to wear shorts around the house.

[2] S.F. was 16 years old when she testified.

Before the police were ever involved in the matter, F.F. said D.T. had told her about one night when D.T. was sleeping in the living room with defendant and he tried to lift up her skirt. This was "months" before the police began their investigation. F.F. told the jury D.T. was crying when she told her what had happened and told her she did not like it. F.F. told D.T. to just come sleep with them in their room in the future, and from then on, she did.

B.) *C.F.*

When police told C.F. something had happened between D.T. and one of her uncles, C.F. testified she immediately knew they were talking about defendant. C.F. said sometime during the previous year D.T. had told her she had been sleeping in the living room when she felt defendant touching her. C.F. said she also told D.T. to sleep in the other room with C.F. and her sisters. C.F. also testified that one time when she was sleeping in the bottom bunk bed and F.F. was in the top bunk bed, she saw defendant reaching over F.F. C.F. then watched defendant get into the bed with F.F. Defendant left when he saw C.F. was awake.

C.F. further testified when she and F.F. were in junior high, several years earlier, F.F. had told her that defendant told F.F. to have sex with him. C.F. said she also noticed that defendant would look at F.F.'s body when she was around. She also saw defendant doing something "weird" with his tongue, and licking his lips when he was looking at F.F. C.F. never told anyone about defendant's conduct because she did not want to break up her family.

C.) *D.T.'s Aunt*

D.T.'s aunt testified that while she and her daughters were at the police station for the original interviews, she spoke to D.T.'s mother. D.T.'s mother told her she was worried her children were going to be taken away from her, and said "I'm going to bring [D.T.] down and tell her to say this didn't happen." The aunt denied her daughters

ever said D.T. told them defendant touched her inappropriately. She also did not recall F.F. reminding her at the police station that she had told her about what D.T. had said.

4. *Child Sexual Abuse Accommodation Syndrome* (*CSAAS*) *Evidence*

Dr. Jody Ward, a clinical and forensic psychologist, testified for the prosecution as a CSAAS expert. Ward stated she had no knowledge about the current case, had not received any reports or other materials to review, nor listened to or watched any taped statements. Ward spoke in generalities to educate the jury about CSAAS. She neither had, nor expressed, any opinion whether anyone in the case was suffering from CSAAS; nor was she asked. Ward stated CSAAS was originally developed to explain how some child sexual assault victims' postmolestation behavior seemingly contradicts their accusations. She emphasized CSAAS is not diagnostic and cannot determine whether sexual abuse actually occurred in any particular case.

Ward explained there are five typical components to CSAAS. The first is "secrecy," i.e., victims do not disclose the abuse. Children tend to keep sexual abuse secret for a long time. The second is "helplessness." Because the victim often depends on the adult who is abusing them, he or she feels nothing can be done about the abuse. The third is "entrapment and accommodation," where the child becomes trapped in the situation and adapts to it. The fourth is "delayed unconvincing disclosure," as research has found most victims keep their sexual abuse a secret for a long time. In fact, two-thirds do not report it until adulthood and many never report it at all. The fifth is "retraction or recantation," in which some victims subsequently deny the abuse allegation.

Ward further testified children tend to want to keep their family together. Often there is pressure from family members on the children to take back the allegations of abuse to restore the family to the way it was. As a result, some children will back-pedal, insisting the abuse was not that bad or that they do not remember anything. Similarly, some children will completely recant the abuse claims. Ward explained it was

normal for children to feel guilt after a family member abuser goes to jail. She also said it was quite common to have several abuse victims in the same family who never shared it with one another, or who looked the other way when they did know about it.

The prosecutor offered a general description of the underlying factual dynamics of the current case, and asked Ward whether it was consistent with her personal experience and with the current literature regarding CSAAS. Ward acknowledged it was.

5. *Defense Evidence*

The defense called D.T.'s father, M.T. He testified he talked to D.T. after he found out about the allegations in the case. The exact time frame was not established. D.T. was crying and told him she had lied about defendant touching her. She told him it was "a game or a joke," because she had been talking to a friend at school who said her uncle had touched her. D.T. said that her friend had been adopted after being taken away from her family and her new adopted family was buying her a lot of things. M.T. took D.T. to the police station "to clear things up." Once there, the detectives told him "not to stick [his] nose into the business of the investigation, or they were going to take away the rest of my children." He admitted D.T. did not have a history of lying.

DISCUSSION

1. *The Trial Court Did Not Err by Excluding U Nonimmigrant Status* (*U-Visa*) *Evidence*

A. Background

Defendant contends he was denied due process when the trial court precluded him from introducing immigration status evidence regarding C.F., F.F., and S.F., to explore their alleged motivations to lie to obtain a U-Visa. (See 8 C.F.R. § 214.14 (2018) [describing U-Visa program, which generally permits victims of certain crimes who cooperate with law enforcement to remain temporarily in the United States despite their immigration status].)

In support of counsel's request to introduce such evidence, F.B. testified:

"[Defense counsel:] [D]id you ever have a conversation with any of the girls or their mother about why they are lying about these things?

"[F.B.:] As far as I know, at the beginning, I heard that they did that because they wanted the U-Visa, it was offered to them.

"[Defense counsel:] When you say '[heard],' who told you this?

"[F.B.:] Well, afterwards, I run into [F.F.] and I talked to her. . . . I asked her . . . why they had my son in jail. And she told me that it was her mom's doing, and it was the lady's fault, but I never heard who the lady was.

"[Defense counsel:] So [F.F.] told you about the U-Visas?

"[F.B.:] No [C.F.] did. So, I asked - - no, later I run into [F.F.] and I asked her, 'Are you happy that my son is in jail?'

"And she said, 'no, grandma. Not on my part. It is - - it is the lady to blame.' But I don't know who she was referring to as the lady.

"[Defense counsel:] So, [S.F.] told you about the U-Visa?

"[F.B.:] [C.f.]

"[Defense counsel:] [S.F.], okay, with an S?

"[F.B:] With a C, that they were offered the U-Visas.[3]

"[Defense counsel:] And I'll ask you, to your knowledge, are [C.F.], [S.F.], or [F.F.] U.S. citizens?

"[F.B.:] Just [S.F.] and [H.F.]"

On cross-examination by the prosecutor, F.B. provided additional details:

"[Prosecutor:] So, [S.F.] never mentioned anything about a U-visa to you?

"[F.B.:] No. I have never talked to her.

"[Prosecutor:] And [F.F.] never mentioned anything about a U-Visa to you?

[3] C.F. and S.F. have homophonic first names, so it was often necessary to clarify which witnesses were referring to in their testimony.

"[F.B.:] No. She only told me that it was the lady that was at fault, and that she was the one who told them what to say.

"[¶] . . . [¶]

"[Prosecutor:] Did [C.F.] tell you by who or who offered them [the U-Visas]?

"[F.B.:] No, she didn't tell me who. She told me they were offered the U-Visas and they want to offer it to [D.T.'s mother] as well.

"[¶] . . . [¶]

"[Prosecutor:] Okay. What's a U-Visa?

"[F.B.:] I don't know.

"[Prosecutor:] So when you - -

"[F.B.:] That they were going to be able to get papers.

"[Prosecutor:] Okay. Who told you about a U-Visa and papers?

"[F.B.:] [D.T.'s mother].

"[¶] . . . [¶] . . . .

"[Prosecutor:] "And after [defendant] got arrested, [D.T.'s aunt], and . . . [F.F., S.F. and C.F.], they all moved out of your house, right?

"[F.B.:] Yes.

"[Prosecutor:] Because you were upset with them; right?

"[F.B.:] Yes.

"[¶] . . . [¶]

"[Prosecutor:] And since your three granddaughters and their mom . . . moved out, you haven't had contact with them, right?

"[F.B.:] No

"[Prosecutor:] But you are saying you talked to [C.F.] one time and you talked to her about a U-Visa?

"[F.B.:] Yes.

"[The court:] That was months after this happened, after he was arrested?

"[F.B.:] Yes."

Defense counsel argued this proffer of hearsay evidence was sufficient to permit him to explore C.F., F.F., and S.F.'s credibility by showing a possible motivation to incriminate defendant based on favorable immigration treatment.

The prosecutor objected under Evidence Code section 352,[4] and maintained she was unaware of any witness or victim applying for U-Visa protection. She also pointed out that, even accepting F.B.'s testimony, C.F. did not mention anything about a U-Visa until a month after D.T. talked to police. By then C.F. and her sisters had also already come forward with their statements. Moreover, since S.F. was a citizen, she had no need for immigration assistance.

The trial court ruled any evidence regarding immigration status was irrelevant. We find no error.

B. Analysis

Cross-examination designed to expose a witness's motivation in testifying is an important function of the Sixth Amendment right of confrontation. (*Davis v. Alaska* (1974) 415 U.S. 308, 316–317 (*Davis*).) Nevertheless, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Blacksher* (2011) 52 Cal.4th 769, 821.) Thus, a trial court has broad discretion in determining whether to admit or exclude evidence. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658 (*Mullens*). As a result, we review a trial court's rulings regarding the admission or exclusion of evidence on the ground of relevance for an abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

[4] Evidence Code section352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"'[T]he term judicial discretion "implies absence of arbitrary determination, capricious disposition or whimsical thinking."' [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*Mullens*, *supra*, 119 Cal.App.4th at p. 658.) Indeed, the exclusion of impeachment evidence will only be disturbed "on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citations]." (*People v. Clark* (2011) 52 Cal.4th 856, 932 (*Clark*).)

Here, the court ruled the evidence was irrelevant, and did not make a ruling on the prosecutor's Evidence Code section 352 objection. It is true impeachment evidence establishing a motivation to lie can be relevant because evidence is "relevant" if it has any tendency in reason to prove or disprove any disputed fact of consequence, including evidence relevant to the credibility of a witness. (Evid. Code, §§ 210, 780, subd. (f).) Further, "[a]s a general matter, a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias. [Citations.]" (*People v. Brown* (2003) 31 Cal.4th 518, 544.) But that is not the end of the inquiry.

Evidence is irrelevant if it invites speculation. If the inference of the existence or nonexistence of a disputed fact to be drawn from proffered evidence is based on speculation, conjecture, or surmise, the proffered evidence is not relevant evidence. (See *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 47.) The inference defendant sought to present to the jury here—that one or more members of the two families was biased because of talk of U-Visas—was based on mere speculation. F.B.'s testimony in this regard was simply conjectural hearsay.

As such, it was insufficient to establish error in the trial court's limitation of cross-examination on the issue. There was no evidence of prosecutorial inducement for the girls' cooperation. Indeed, the prosecutor denied it. No offer of proof was made that any actual assistance or benefits of any sort were promised or provided to D.T., her cousins, her mother or her aunt. (Cf. *People v. Dyer* (1988) 45 Cal.3d 26, 50 ["In the absence of proof of some agreement which might furnish a bias or motive to testify against defendant, the fact that each witness had been charged with the commission of unrelated offenses was irrelevant"].) Consequently. the trial court did not abuse its discretion in excluding the evidence as irrelevant.

Furthermore, "[a]lthough the trial court did not expressly base its ruling on Evidence Code section 352, we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm. """"No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'''' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 582 (*Geier*), overruled on another point by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311.) Thus, "'we review the ruling, not the court's reasoning, and, if the ruling was correct on any ground, we affirm.'" (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.)

Because S.F. was a citizen who had no need for a U-Visa,[5] and D.T. and her cousins had made their statements to schoolmates, the school principal, and police long before F.B's claims about U-Visas, defense counsel's marginal offer of proof shows any impeachment evidence had slight probative value. Balanced against this minimal

[5] There is nothing in the record regarding D.T.'s immigration status.

probative value was the high probability the admission of U-Visa evidence would have "necessitate[d] undue consumption of time or . . . confus[ed] the issues, or . . . misle[d] the jury." (Evid. Code, § 352.) On this ground, therefore, the exclusion of any U-Visa evidence was not error. (Cf. *Geier, supra,* 41 Cal.4th at p. 585.)

Defendant argues his purported U-Visa evidence would not have been unduly time-consuming to present. Not so. To impeach the family members, defendant would have had to elicit and explain the intricacies of temporary protected status, eligibility for U-Visa qualification, and all the complexities of immigration law related to these topics. This would likely have required expert testimony. The defense would have been required to establish that the witnesses and victims knew about U-Visas, when they learned it, whether they either needed or qualified for such assistance, or whether their close family members did.

The People would have been entitled to call an expert witness to rebut defendant's proposed expert on immigration law. For the jury to evaluate the degree to which the witnesses and their family members were likely motivated by a desire to obtain a U-Visa, they would have to have a thorough understanding of the prerequisites for issuance of such a visa. The time consumed exploring immigration issues could have exceeded the time it took to present the evidence related to the charged crimes. Further, the risk of jury distraction and confusion would be commensurately high—the jurors would have had to concern themselves with the application of complex immigration laws to each individual's circumstances to evaluate any impeachment value.

More importantly, questions regarding immigration status have the potential to be extremely prejudicial. Indeed, highlighting the inherent prejudicial effect of immigration issues in the trial setting, since defendant's trial Evidence Code section 351.4 has been enacted. It specifically provides: "In a criminal action, evidence of a person's immigration status shall not be disclosed in open court by a party or his or her attorney unless the judge presiding over the matter first determines that the evidence is

admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status." (Evid. Code, § 351.4, subd. (a), added by Stats. 2018, ch. 12, § 2.)

Under these circumstances, it would not have been an abuse of discretion for a court to find the evidence at issue "'might involve undue time, confusion, or prejudice which outweighs its probative value.'" (*Clark, supra*, 52 Cal.4th at p. 932.) The "latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) Here, the potential for undue prejudice substantially outweighed any probative value, and it was not error to avoid a "mini-trial" on a collateral impeachment issue of marginal value.

We also reject defendant's claim the exclusion of the U-Visa evidence violated his federal constitutional rights to confront prosecution witnesses and present a complete defense. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. And as we [have] observed . . . , 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*), quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

Thus, unlimited inquiry into collateral matters is not permitted. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) In fact, "'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination.' [Citation.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Unless defendant can show the proposed cross-examination would have produced a significantly

different impression of the witness's credibility, the trial court's exercise of its discretion in this regard will not be deemed to have violated defendant's confrontation rights. (*Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) No Sixth Amendment violation will be found if the jury is exposed to the essential facts from which it could appropriately draw inferences relating to the reliability of the witness. (*Davis, supra,* 415 U.S. at p. 318.)

Defendant relies on *Davis,* to support his claim of constitutional error, but it is distinguishable. In *Davis,* a safe stolen in a burglary was found near the home of a juvenile, a key prosecution witness who had told the police he had seen one of the defendants near where the safe was found. The juvenile was himself on probation for burglary. The defendant sought to show the witness was concerned about his own probationary status and made a hasty identification to shift suspicion away from himself. (*Davis, supra,* 415 U.S. at pp. 310–311.) The defendant was not allowed to bring out the juvenile court adjudication and probation, which would have potentially impeached the juvenile. (*Id.* at p. 318.) The trial court's ruling limiting cross-examination was based on an Alaska statute limiting the admissibility of juvenile records. (*Id.* at p. 311.) The Supreme Court held the significant limitations placed on the defendant's ability to cross-examine this key witness violated his right to confrontation, a right which trumped Alaska's statutory interest in preserving the anonymity of juvenile offenders. (*Id.* at pp. 318-320.)

Unlike *Davis,* however, an evidentiary hearing was conducted in this case, and no nonspeculative evidence of promised or anticipated favorable immigration treatment was evinced. Instead, there were only vague suggestions some individuals may have been aware of U-Visas at some undetermined time. Although a defendant is entitled to elicit evidence favorable to his or her defense, a defendant is not entitled to engage in a fishing expedition based on a speculative showing such evidence might possibly exist.

(See *People v. Gallego* (1990) 52 Cal.3d 115, 197 [no abuse of discretion by failing to allow defendant to conduct fishing expedition to attempt to discover good cause when no independent basis to believe good cause exists].) ""'"The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence.'"" [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 444.) No abuse of discretion arises where the foreclosed line of inquiry is not likely to produce evidence relevant to the issues presented and the trial court, not the jury, determines at the outset whether evidence is relevant. (*People v. Dyer* (1988) 45 Cal.3d 26, 48, 50; cf. *People v. Brown* (2003) 31 Cal.4th 518, 545, fn. 9 [trial court did not violate confrontation clause in precluding impeachment with evidence of marginal relevance].)

Here there was no tangible *evidence* the witnesses and victims were motivated to testify falsely to obtain favorable immigration treatment. Thus, the trial court properly prevented defense counsel from exploring this speculative line of inquiry in front of the jury, and did not abuse its discretion in excluding reference to immigration issues. Nor did such exclusion violate defendant's confrontation rights.

2. *Defendant's Prosecutorial Misconduct Claim Was Forfeited and He Has Not Shown Trial Counsel Was Ineffective by Failing to Object*

A. Defendant Forfeited His Prosecutorial Misconduct Claim by Not Objecting at Trial

Defendant argues the prosecutor committed misconduct in her rebuttal argument by responding to defense counsel's closing arguments D.T. and her cousins were all liars. Specifically, of the prosecutor's 37 pages of closing argument, he focuses on two pages of the prosecutor's rebuttal argument:

> "To find the defendant not guilty, you would all have to think [D.T.] is really a mastermind, that she crafted this entire thing. [¶] To find the defendant not guilty, you would have to think she came up with this idea, and she thought, 'well, it will look better if I first don't tell police, or anyone important, and I just tell friends. And I hope their friends tell their parents. And I hope my friends'

> parents tell the principal. And then, I'll get called in the office and maybe the police will get involved and I'll get a new family." Does that make sense? [¶] To find the defendant not guilty, you have to believe that [D.T.] concocted this entire thing to get adopted by her cousins that she liked better. Well, that's where [defendant] lives. Why not claim it was her dad or grandfather touching her? That would get her out of the house, wouldn't it? [¶] To find the defendant not guilty, you would have to think that three other girls, the Defense would have you believe, are just lying to protect [D.T.], or cover for [D.T.], or help her with her story. [¶] Again, they came in and gave those award-winning performances, and made all this up. I guess they must have gotten together somehow before they went to the police station, but yet, oh, yeah, they were contacted at school, not knowing anything, and at the police station, they all are giving the same story about the defendant licking his lips in a sexual manner. How did they get that story straight? [¶] They were talking about a conversation . . . where one told the other [defendant said] he wanted to have sex with her. How did they keep those stories straight before the police pulled them from school and sat them down in the police interrogation room? [¶] To find him not guilty, the girls were masterminds at crafting a story to take down an uncle that they have nothing against. There is absolutely no evidence that they want to take him down for any reason, that they are mad at him, angry at him, and want him out of their lives. It is quite the contrary, isn't it? [¶] That's what you have to believe to find the defendant not guilty of doing these crimes, because all the evidence points to what he did, and that is, he committed these lewd acts on [D.T.] and [S.F.]. [¶] So, I ask you to consider the evidence."

Defendant faults the prosecutor's wording by telling the jury that in order to find him not guilty, they would have to believe X, Y, and Z. We agree her choice of words were poor. In context, however, it is clear the prosecutor was replying to defense counsel's closing argument suggesting D.T.'s cousins were all lying.[6] Her point was it would be unreasonable to infer from the evidence presented that the cousins were weaving a web of lies to protect their cousin, because to do so, jurors would have to believe there was an elaborate conspiracy involving D.T. and her cousins to frame

[6] Counsel had earlier argued: "[N]ow we are going to talk about the web [of lies] that these girls weaved." "[The cousins] have an agenda, and it is to protect [D.T.] because they believe her." "What is their motivation? Their motivation is they believe [D.T.] . . . and they want to protect [D.T.]." "[Y]ou have three girls coming in here trying to help out their cousin, but that's all it is." "That's their motivation, they want to protect their little cousin."

defendant for some unknown reason. Moreover, the girls would have had to make sure they all gave consistent stories about their own experiences with defendant, despite being interviewed separately. These, the prosecutor maintained, would be unreasonable inferences to draw from the evidence.

It is permissible for a prosecutor "to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory. [Citations.] It is permissible to urge that a jury may be convinced beyond a reasonable doubt even in the face of conflicting, incomplete, or partially inaccurate accounts. [Citation.] It is certainly proper to urge that the jury consider all the evidence before it." (*People v. Centeno* (2014) 60 Cal.4th 659, 672. (*Centeno*)) Moreover, "the prosecution can surely point out that interpretations proffered by the defense are neither reasonable nor credible." (*Id.* at p. 673.)

Here, the prosecutor's comments are like those in *People v. Romero* (2008) 44 Cal.4th 386, that the jury must "'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable.'" (*Id.* at p. 416.) The *Romero* court approved the comment because "[n]othing in [it] . . . lessened the prosecution's burden of proof. The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*Ibid.*) The prosecutor here was unartfully making a similar point, namely, that the jury should reject any inferences from the evidence it finds would be unreasonable.

In any event, we need not reach the merits of defendant's prosecutorial misconduct argument because we conclude the claim has been forfeited. The law governing claims of prosecutorial misconduct is well established. Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Earp* (1999) 20 Cal.4th 826, 858 (*Earp*).) In more extreme cases, a defendant's federal

due process rights can be violated when a prosecutor's improper remarks """"infect[] the trial with unfairness,""""" making it fundamentally unfair. (*Ibid.*)

Even so, """"[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 251-252.) However, an exception to this rule exists and "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) Similarly, failure to request the jury be admonished does not forfeit the issue for appeal if """"an admonition would not have cured the harm caused by the misconduct."""" (*Ibid.*)

Here, defense counsel did not object to the prosecutor's comments during closing argument, and made no request that the jury be admonished. And even though a "defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct" (*Centeno, supra,* 60 Cal.4th at p. 674), defendant has not established an objection or admonition would have been futile in this case.

"A defendant claiming that [an exception] applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*People v. Panah* (2005) 35 Cal.4th 395, 462; *People v. Gray* (2005) 37 Cal.4th 168, 215 [nothing in the record showing prosecutor engaged in """""a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process'""""""]; compare *Hill, supra,* 17 Cal.4th at p. 822 [objection futile where the defendant's attorney was subjected to a constant barrage of the prosecutor's unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods].)

Moreover, defendant's cited authority in support of his claim any objection would have been futile, and any admonition would not have cured the harm, is inapposite. Thus, *People v. Fritz* (2007) 153 Cal.App.4th 949, involved the erroneous admission of prejudicial evidence of a prior conviction, and how a limiting instruction was insufficient to purge its taint. Similarly, *People v. Coleman* (1985) 38 Cal.3d 69, also involved the admission of prejudicial evidence—over defense objections—where a limiting instruction was held to be futile because the "potential improper use of the [evidence] went to the heart of the defenses offered, and the error must therefore be considered prejudicial." (*Id.* at p. 95.) Likewise, *People v. Antick* (1975) 15 Cal.3d 79, also focused on an Evidence Code section 352 issue, this time concerning a testifying defendant's impeachment with his prior felony convictions. (*Antick,* at p. 98.) Finally, defendant's citation to *Krulewitch v. United States* (1949) 336 U.S. 440, is particularly inapt, involving as it does Justice Jackson's dissatisfaction with his perceived misuse of conspiracy prosecutions by the federal government. (*Id.* at p. 453 (conc. opn. of Jackson, J.).)

Furthermore, even assuming the prosecutor's comments were improper, these are exactly the types of remarks correctable by an objection and a trial court's admonition. (Cf. *Centeno, supra,* 60 Cal.4th at p. 674 ["[a] prosecutor's misstatements of law are generally curable by an admonition from the court"].) "Nothing in this record indicates that an objection would have been futile. Nor was the prosecutor's argument so extreme or pervasive that a prompt objection and admonition would not have cured the harm." (*Ibid.*) So too here. We therefore conclude defendant may not pursue his claim of prosecutorial misconduct on direct appeal because the issue has been forfeited. (*Ibid.*)

B. Defendant Has Not Established Defense Counsel Was Constitutionally Ineffective for Failing to Object to the Prosecutor's Closing Argument

Alternatively, defendant suggests if we find his prosecutorial misconduct

claim forfeited, then his counsel's failure to object amounts to a denial of his right to the effective assistance of counsel. We also reject this contention.

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Moreover, "[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) In such situations, a defendant is normally left to his or her habeas corpus remedies. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

To prevail on his ineffectiveness of counsel claim, defendant must satisfy a two-pronged test. First, he must *show* his counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Second, "prejudice must be affirmatively *proved*; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389, italics added); *Strickland, supra*, 466 U.S. at p. 694.) "'The proof . . . must be a demonstrable reality and not a speculative matter.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

Furthermore, "[i]n assessing the adequacy of counsel's performance, a court must indulge 'a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citations.]' [Citation.] If 'the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 988.) Thus, "'[u]nless a defendant *establishes* the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."'" (*Centeno, supra,* 60 Cal.4th at pp. 674-675, italics added.)

More specifically, "the decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one" (*People v. Padilla* (1995) 11 Cal.4th 891, 942), and "a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772; see *People v. Kelly* (1992) 1 Cal.4th 495, 540 [an attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel]; *People v. Milner* (1988) 45 Cal.3d 227, 245 [finding no ineffective assistance of counsel where even if one or more of prosecutor's statements were improper, none of them took up more than a few lines of the lengthy closing argument, and counsel would have acted well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection].)

Defendant cites *People v. Guizar* (1986) 180 Cal.App.3d 487, to support his claim there could be no conceivable ground for defense counsel to have failed to object to the prosecutor's closing argument. We find it unavailing. In *Guizar,* the error involved had nothing to do with a prosecutor's closing arguments and instead involved a failure to object to the admission of quite prejudicial prosecution evidence. The *Guizar*

court found prejudicial error in allowing evidence a witness stated he had heard someone say the defendant had earlier committed other murders. The sole issue in the trial was the defendant's state of mind at the time of the charged shooting. The statement had little, if any, relevance to the issues presented and plainly could have had a prejudicial effect on the jury's consideration of the defendant's degree of responsibility. The court found there was no conceivable reason why defense counsel did not object to the introduction of that evidence on the ground it was more prejudicial than probative. (*Guizar*, at p. 492.)

Defendant's reference to *Centeno*, also misses the mark. While the issue in *Centeno* was prosecutorial misconduct in closing argument, and the court did find there was no conceivable reason for defense counsel's failure to object, the errors there were qualitatively different from any error defendant assigns in this case.

In *Centeno*, the prosecutor presented the jury with an image of the outline of California with hypothetical testimony from witnesses describing various cities to explain the concept of reasonable doubt. The Supreme Court held that "[t]he use of an iconic image like the shape of California[, as used in *Centeno* and *People v. Otero* (2012) 210 Cal.App.4th 865, 874] or the Statue of Liberty[, as used by the prosecutor in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1264–1265], unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt" because it is not based on the evidence presented but rather "draw[s] on the jurors' own knowledge," encouraging them "to guess or jump to a conclusion." (*Centeno*, 60 Cal 4th at p. 669.) The visual aid was misleading for that reason (*id.* at p. 670) and because it did not accurately depict the state of the actual evidence in the case, which "involved starkly conflicting evidence and required assessments of witness credibility." (*Ibid.*) Although "not all visual aids are suspect," the problem was "that it had nothing to do with the case or evidence before the jury." (*Id.* at p. 671.)

The court found no possible tactical reasons for defense counsel's failure to timely object. (*Centeno, supra*, 60 Cal.4th at pp. 675-676.) First, "'[e]xplaining' the

reasonable doubt standard by using an iconic image unrelated to the evidence is particularly misleading to the jury and strikes at the most fundamental issue in a criminal case. The image is too powerful and pivotal to dismiss as irrelevant or trivial argument. Additionally, the argument was aimed at lessening, not heightening, the burden of proof. The prosecutor posited an easy example of proof beyond a reasonable doubt to reassure this jury that it could confidently return guilty verdicts in a case not nearly so strong as her hypothetical. . . . [¶] Additionally, because the prosecutor's hypothetical came in rebuttal, defense counsel had no opportunity to counter it with argument of his own. His only hope of correcting the misimpression was through a timely objection and admonition from the court. *Under these circumstances*, we can conceive of no reasonable tactical purpose for the defense counsel's omission." (*Ibid*., italics added.) The instant case is unlike *Centeno.*

First, in *Centeno* there were two prosecutorial errors, the most significant of which involved the faulty visual "aid." The additional error was telling the jury it was "reasonable" to believe defendant was guilty. Indeed, the *Centeno* prosecutor "repeatedly suggested that the jury could *find defendant guilty* based on a 'reasonable' account of the evidence." (*Centeno, supra,* 60 Cal.4th at p. 673.) However, even though this error "introduced further confusion," the court did not find it alone was enough to justify reversal. (*Id.* at p. 676.)

Second, unlike *Centeno*, here the trial court instructed the jury *after* closing arguments, and instructions on reasonable doubt, the burden of proof, and inferences to be drawn from the evidence were provided. The jury was told the attorneys' arguments were not evidence, and "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Thus, the prosecutor's closing argument was not "the last word on the subject." (*Centeno, supra,* 60 Cal.4th at p. 677.)

"Absent any contrary indication, we presume the jury followed th[e] instruction[s]." (*People v. Gray* (2005) 37 Cal.4th 168, 217.) Given the circumstances of

this case, "we discern no reasonable likelihood [citation] that the prosecutor's statements would have misled the jury" into convicting defendant under a standard less than proof beyond a reasonable doubt standard. (*People v. Mayfield* (1993) 5 Cal.4th 142, 179; cf. *Centeno, supra*, 60 Cal.4th at p. 677.) Because defendant has not established the contrary, "'we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."'" (*Centeno,* at pp. 674-675.) It follows, defendant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to the prosecutor's closing arguments.

3. *CALCRIM No.* 1193 *Does Not Lessen the Prosecution's Burden of Proof*

The trial court instructed the jury with CALCRIM No. 1193, modified to read: "You have heard testimony from Ward regarding [CSAAS]. [¶] . . . Ward's testimony about [CSAAS] is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not the alleged victims conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

Defendant argues this instruction fails to adequately inform the jury it cannot consider CSAAS as evidence of his guilt. Defendant did object to giving CALCRIM No. 1193, but instead on the grounds all CSAAS evidence is too prejudicial. He did not ask for the instruction to be modified, offer the CALJIC alternative, or request a more specific pinpoint instruction on the subject. Defendant now maintains CALCRIM No. 1193 erroneously permitted the jury to consider the CSAAS testimony as supporting the truth of the allegations against him. He suggests there simply is no difference between relying on CSAAS testimony to evaluate the complaining witnesses' believability, and relying on CSAAS testimony as evidence the crime took place. This, he claims, is "a distinction without a difference." The law is otherwise.

It is well established that "expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.] 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. [¶] The great majority of courts approve such expert rebuttal testimony.' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, fn. omitted (*McAlpin*).) Thus, expert testimony relating to CSAAS can be offered properly at trial where a victim's credibility is called into question because of delayed reporting or, like here, a recantation of prior allegations. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.)[7]

In *People v. Perez* (2010) 182 Cal.App.4th 231, a victim's testimony at trial was inconsistent with her previous statements in a way that tended to exculpate the defendant. Like D.T. here, she testified she lied to police in her earlier statements, and denied or claimed not to remember other aspects of the defendant's conduct. (*Id.* at p. 234, fn. 2.) As a result, CSAAS testimony was properly admitted because ""'"[s]uch expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. . . .' [Citation.]"'" (*Id.* at p. 245.) "Expert testimony about CSAAS 'is inadmissible to prove that a child has been abused because the syndrome was developed not to prove abuse but to assist in understanding and treating abused children. However . . . such evidence may be admitted to dispel common

[7] There were reporting delays in this case as well: S.F. did not tell anyone about defendant's conduct until many years after it occurred.

misconceptions the jury may hold as to how such children react to abuse.'" (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1069.)

This is not a case where the prosecution introduced the CSAAS evidence in its case-in-chief to support the truth of the molestation claims rather than to disabuse the jury of a common misconception. (See, e.g., *People v. Bowker* (1988) 203 Cal.App.3d 385, 394-395.) Rather, the record here shows the CSAAS evidence was presented to the jury in a manner that was narrowly tailored to inform the jury that counterintuitive reactions, including recantations, were not uncommon for child molestation victims. Ward's testimony went no further than that.

In addressing a claim of jury misinstruction, we assess the instructions as a whole and view the challenged instruction in context with other instructions to determine whether there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Jennings* (2010) 50 Cal.4th 616, 677.) We also presume that the jury followed the court's instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.) Here, the jury was instructed to "[p]ay careful attention to all of [the] instructions and consider them together" (CALCRIM No. 200), that "certain evidence was admitted for a limited purpose" and to "consider that evidence only for that purpose and for no other" (CALCRIM No. 303). CALCRIM No. 1193 then told the jury that the CSAAS evidence was not evidence defendant molested D.T., and to use the CSAAS evidence "only" for the limited purpose of determining whether D.T.'s conduct was inconsistent with the conduct of a child who had been molested "and in evaluating the believability of her testimony" that the molestations occurred. While it is true that evaluating an alleged molestation victim's "believability" may ultimately assist the jury in determining whether to credit the victim's statements molestations occurred, the same may be said of *any* evidence that is admitted solely on the issue of a witness's credibility.

As stated in *McAlpin, supra*, 53 Cal.3d at page 1300, expert testimony on CSAAS "is admissible to rehabilitate [the child] witness's credibility when the defendant

suggests that the child's conduct after the incident . . . is inconsistent with his or her" molestation claims. CALCRIM No. 1193 properly limited the jury's consideration of the CSAAS to its permissible purpose. It is not reasonably likely the jury understood CALCRIM No. 1193 as allowing it to use the CSAAS evidence for the impermissible purpose of determining the molestations occurred, or that D.T.'s prior molestation claims were true. Rather, the jury likely understood the instruction as permitting it to use the CSAAS evidence solely for the distinct and permissible purpose of evaluating all of D.T.'s statements and her credibility as a witness in light of the evidence that her recantations in her CAST interview and at trial were inconsistent with the conduct of a child who had been molested. In short, there was no instructional error.

4. *The Trial Court Erred in Ordering Defendant to Submit to Non-confidential AIDS Testing Without a Probable Cause Determination*

Section 1202.1 provides in pertinent part that the trial court "shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immunodeficiency syndrome (AIDS) within 180 days of the date of conviction." (§ 1202.1, subd. (a).) "For purposes of this section, 'sexual offense' includes . . . [l]ewd or lascivious conduct with a child in violation of Section 288," but only if "the court *finds that there is probable cause* to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (§ 1202.1, subd. (e)(6)(A)(iii), italics added.)

Here, the trial court ordered AIDS testing without a probable cause finding, and neither party brought the issue to the court's attention. Even though defendant failed to raise the issue at the time of sentencing, it is one that may be raised for the first time on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1123 (*Butler*).)

However, "[g]iven the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding

for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. . . . '[In] the absence of an objection at trial, the prosecutor had no notice that such evidence would be needed to overcome a defense objection.' [Citations.] Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order." (*Butler, supra*, 31 Cal.4th at p. 1129.)

Accordingly, the appropriate remedy in this case is "to remand the matter for further proceedings at the election of the prosecution." (*Butler, supra,* 31 Cal.4th at p. 1129.)

DISPOSITION

The order requiring defendant to submit to testing for AIDS is vacated and the matter is remanded. Should the prosecutor request a hearing concerning AIDS testing within 30 days of the filing of the remittitur, the trial court shall conduct a further hearing, at which defendant shall be present, concerning whether the offense was a "sexual offense" within the meaning of section 1202.1, subdivision (e)(6). If no request is made within the stated period, the superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.